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No. 18173 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COAST METALS, INC., a corporation,

Appellant,

vs.

WALL COLMONOY CORPORATION, a corporation,

Appellee.

REPLY BRIEF FOR PLAINTIFF- APPELLANT.

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REPLY BRIEF FOR PLAINTIFF- APPELLANT.

The brief for defendant-appellee, Wall Colmonoy Corporation, fails to provide any support for the conclusions of the District Court that claims 1, 3, and 4 of Cape Patent No. 2,743,177, the patent in issue on appeal, are invalid by reason of prior invention and prior use, not for experimental purposes, within the meaning of 35 U. S. C. A., Sections 102(a) and 102(b). These conclusions must be taken as wholly unsupported either by the findings of fact made by the District Court or by any evidence in the record.

The gist of the contentions advanced by Wall Colmonoy in its brief appears to be that claims 1, 3, and 4 of the patent in issue are invalid by reason of want of invention. Wall Colmonoy fails to show any substantial evidence to support its contentions of want of invention, and fails almost completely to meet the

factual matters supporting validity of these claims as presented in the Opening Brief for Plaintiff-Appellant, Coast Metals, Inc.

This brief endeavors to deal as summarily as possible with those matters asserted by Wall Colmonoy relating to want of invention that are in most urgent need of correction, as well as with those new issues raised by Wall Colmonoy as to which there are neither findings of fact nor conclusions, namely, the issues of misleading the Patent Office and indefiniteness of the claims of Patent No. 2,743,177.

Wall Colmonoy Fails to Refer to Any Substantial Evidence Showing That the Discovery of the Patented Alloys Did Not Constitute Invention.

In Patent No. 2,743,177, Cape described his discovery, made prior to May 2, 1952, that nickel, silicon, and boron in the proportions specified in the patent produced alloys having a substantially enhanced combination of characteristics for brazing and hard facing. The disclosure of the patent leaves no doubt that the alloying constituents of the invention were nickel, silicon, and boron. In its brief, Wall Colmonoy does not refer to any evidence in the record to show that anyone prior to Cape had combined only nickel, boron, and silicon in the proportions specified in the claims of the patent. Even further, Wall Colmonoy does not refer to any evidence to show that anyone previous to Cape had combined nickel, boron, and silicon as the only alloying constituents of a metallic alloy. It therefore stands established that the alloy compositions claimed in claims 1, 3, and 4 were new and useful. This remains true even with due allowance for the statement in the patent to the effect that the al-

loys consisting of nickel, silicon, and boron could tolerate, whenever present in the alloy, small amounts of iron, manganese, and chromium, in a total amount of less than 5%. Certainly, the inventor could not be expected to limit his invention to a completely pure alloy, for impurities are inherent in the raw materials from which alloys are made [R. T. 73-74; 315].

Since there is no evidence to refute the fact that the patented alloys were new and useful, Wall Colmonoy in its brief attacks the validity of claims 1, 3, and 4 on the basis that the discovery of the claimed alloys did not constitute invention. Coast Metals has in its Opening Brief (pp. 42-58) set forth the evidence in the record that establishes the lack of obviousness of the alloys of claims 1, 3, and 4 considered at the time of the invention. Wall Colmonoy in its brief does not meet this evidence but argues at length the properties of its prior art Colmonoy alloys, Colmonoy Nos. 4, 5, 6, and 20, and attempts to blur the differences between these alloys and the patented alloys by interwoven references to alloys that are not a part of the prior art, namely, Coast Metals No. 53 and No. 56 and the alloys of Patent No. 2,755,183, the other patent in the suit below.

Significantly, Wall Colmonoy does not discuss the properties of its prior art Colmonoy alloys by reference to the specific compositions of these alloys. These prior art Colmonoy alloys were nickel-base alloys which contained varying amounts of boron and silicon combined with substantial quantities of chromium and iron. Of the alloys of this group, the least amount of chromium and iron was in Colmonoy No. 20 (from about 9% upward); the greatest amount of chromium and

iron was in Colmonoy No. 6 (from about 17% upward). Given that there were present in the prior art Colmonoy alloys both silicon and boron, what evidence or what finding shows that the properties or composition of the prior art Colmonoy alloys brought it within the skill of the art to strip away the large quantities of chromium and iron in the prior art Colmonoy alloys and to discover the boron-silicon relationship claimed in Patent No. 2,743,177? Wall Colmonoy points to no such evidence or finding because there is none.

Even though silicon and boron were present in some amounts in both Colmonoy No. 20 and Colmonoy No. 6, the latter had a melting point of 1925°F and chromium and iron in an amount from 17% upward, and Colmonoy No. 20 had a melting point of 2225°F and chromium and iron in an amount from 9% upward. The mere fact that these prior art Colmonoy nickel-base alloys included silicon and boron together with the large quantities of chromium and iron of itself shows nothing. As said in *Pointer v. Six Wheel Corporation*, 177 F. 2d 153, 160 (9th Cir. 1949):

“ . . . invention cannot be defeated merely by showing that, in one form or another, each element was known or used before. . . . ”

This statement, made with respect to the field of mechanics, is equally, if not more, applicable to the fields of chemistry and metallurgy. A chemical element in a different combination may achieve a new quality or function which is not predictable from its use in another combination. See *Toledo Rex Spray Co. v. California Spray Chemical Co.*, 268 Fed. 201, 204 (6th Cir. 1920).

In *Pointer v. Six Wheel Corporation, supra*, 177 F. 2d 153, 160, 161, the Court said:

“At times, the result is accomplished by means which seem simple afterwards. But, although the improvement be slight, there is invention, unless the means were plainly indicated by the prior art. . . .”

Wall Colmonoy points to no evidence or finding showing that the prior art Colmonoy alloys in any way indicated the silicon-boron relationship of the patented nickel-silicon-boron alloys or the properties obtained by this relationship. In the present case, the improvement obtained was more than slight. Appellant's Opening Brief has already fully set forth at pages 32-36 the evidence in the record affirmatively showing that alloys having compositions within the claims of Patent No. 2,743,177 provided significant advantages over the prior art Colmonoy alloys and it is not considered necessary to repeat it here.

In its brief (pp. 24-25), Wall Colmonoy seeks to minimize the significance of Wall Colmonoy's search for a low-melting alloy as to the issue of obviousness on the basis that the alloy LM Nicrobraz is “an alloy clearly outside of this patent,” namely, Patent No. 2,743,177 here in issue. It is fully agreed that LM Nicrobraz, which is not an alloy of the prior art as to Patent No. 2,743,177, is clearly outside the patent. Since, however, LM Nicrobraz contains a total amount of chromium and iron [Ex. AN at C. R. 347; 355] that is about the same as that found in the prior art Colmonoy No. 20 and is substantially less than that found in the prior art alloys Colmonoy Nos. 4, 5, 6, the

argument is singular when viewed in the light of Wall Colmonoy's efforts to bring its prior art alloys, Colmonoy Nos. 4, 5, 6, and 20 within the scope of the patent.

As to the significance of its search for a low-melting alloy, fully discussed in appellant's Opening Brief, pages 43-46, Wall Colmonoy has in its brief missed the point. The significance is that the prior art Colmonoy alloys were not low-melting alloys, as demonstrated by the fact that Wall Colmonoy, recognizing in 1952 the need for a low-melting nickel-base alloy [R. T. 341-342], sought to meet this need by the approach of isolating a low-melting alloy from its Colmonoy alloys [R. T. 342]. That this procedure resulted in an alloy, LM Nicrobraz, clearly outside the scope of the patent, forcefully demonstrates Cape's contribution to the advancement of the art and the lack of obviousness of the alloys of his invention.

In its brief, Wall Colmonoy refers to another alloy of Coast Metals, Coast Metals No. 53, covered by Patent No. 2,755,183, the single claim of which was held invalid by the District Court. While it makes comparisons between the properties and composition of Coast Metals No. 53 and the alloys covered by Patent No. 2,743,177, here in issue, Wall Colmonoy fails to point out that neither Coast Metals No. 53 nor Patent No. 2,755,183 were part of the prior art as to the patent here in issue.

The composition of Coast Metals No. 53 [Ex. DK at C. R. 434] compares to the composition of Wall Colmonoy's LM Nicrobraz [Ex. AN at C. R. 347; 355] as follows:

	Coast Metals No. 53—%	LM Nicrobraz—%
Boron	2.90	3.00
Silicon	4.50	4.50
Chromium	7.00	6.50
Iron	3.00	2.50
Nickel	82.10	Balance

It is fully apparent these compositions do not have the relationship of chromium to boron controlled by the chromium boride crystals which in all cases were a part of the prior art Colmonoy alloys. If this relationship were present, the amounts of chromium in Coast Metals No. 53 and LM Nicrobraz would have been between 12.5% and 13%.

LM Nicrobraz was the name given to the low-melting alloy [Find. 17, C. R. 50] first separated the prior art alloy, Colmonoy No. 6, subsequent to the filing of the application on which Patent No. 2, 743,177 issued. It was this low-melting constituent that was described by Mr. LaRou of Wall Colmonoy as having the unusual characteristic of a melting point of 1800°F [R. T. 396] which departed substantially from that of other alloys previously made and sold by Wall Colmonoy [R. T. 395]. The testimony of Wall Colmonoy's own Vice-President in charge of en-

gineering unequivocally shows that LM Nicrobraz was not a part of the same family of alloys as were the prior art alloys, Colmonoy No. 4, No. 5, No. 6, and No. 20. Equally so, Coast Metals No. 53, as is apparent from its composition in comparison with that of LM Nicrobraz, is not a part of the same family of alloys as were the prior art Colmonoy alloys.

Neither Wall Colmonoy's LM Nicrobraz nor Coast Metals No. 53 are a part of the prior art as to Patent No. 2,743,177. The testimony of Wall Colmonoy's Vice-President shows that the properties of these two alloys were significantly different and substantially departed from the properties of the prior art Colmonoy alloys, Nos. 4, 5, 6, and 20.

Equally, the alloys claimed in Patent No. 2,743,177 are separate and distinct from the group of prior art Colmonoy alloys both as to properties and composition. Whether LM Nicrobraz, Coast Metals No. 53, and the alloys described in Patent No. 2,755,183 are improvements based upon the alloys of Patent No. 2,743,177 is not material to the issue here presented since the former are not a part of the prior art as to the '177 patent.

Wall Colmonoy states in its brief, at page 6, that Patent No. 2,755,183, not here in issue, was held invalid because of the prior use and sale of Colmonoy alloys Nos. 4, 5, 6, and 20 by Wall Colmonoy. The findings do not support this unqualified erroneous assertion. While the District Court found that two of the prior art Colmonoy alloys, Colmonoy No. 4 and

Colmonoy No. 20, contained constituents in amounts within the compositional range set forth in the single claim of the '183 patent [Finds. 11 and 12, C. R. 48], it specifically found that LM Nicrobraz, an alloy not part of the prior art as to Patent No. 2,743,177, was first sold on September 16, 1952 and that this alloy was on sale more than one year prior to the effective filing date (January 25, 1955) of the application on which the '183 patent issued [Finds. 17 and 18, C. R. 50].

The record as a whole and the findings themselves are more reasonably susceptible to the conclusion that, as to the '183 patent, the prior sale referred to in the conclusion of the District Court is that of LM Nicrobraz. Wall Colmonoy's efforts to intertwine into one family all of the alloys in this record is simply not supported by the evidence.

In summary, Wall Colmonoy refers to no substantial evidence showing that the discovery of the alloys claimed in claims 1, 3, and 4 of Patent No. 2,743,177 did not constitute invention. It has not met the requirement of this Court that only clear and convincing proof which establishes lack of invention beyond a reasonable doubt can overcome the presumption of validity arising from the issuance of a patent.

There Is No Basis Either in Fact or Law for Wall Colmonoy's Assertion That the Patent Office Was Misled Into Granting Patent No. 2,743,177.

Wall Colmonoy asserts in its brief that Coast Metals' attorney made to the Patent Office false representations which induced it to issue Patent No. 2,743,177, and that resultantly the presumption of validity of the patent is destroyed. There is no finding of fact as to this assertion. There is no indication whatsoever that the District Court in any way considered such an issue in reaching its conclusions. Further, the assertion as to false representations is not supported by the evidence, and the conclusion is contrary to the law applicable to the facts in the record.

In the first instance, the evidence does not establish that the statements made in arguments by Coast Metals' attorney to the Patent Office were false. With respect to the statements to the Patent Office regarding the detrimental effect upon alloys of the presence of aluminum in amounts of 0.1% and above, Mr. Foerster, Technical Director for Coast Metals, testified as to braze samples of alloys containing substantially no aluminum [Ex. 64 at C. R. 137; Orig. Ex. 65, 66] and braze samples of alloys containing aluminum of about 0.1% and above [Ex. 64 at C. R. 137; Orig. Exs. 67, 68, 69, 70]. He testified that the samples were brazed in a tube furnace with a hydrogen atmosphere in the absence of a flux [R. T. 634]. He stated that the alloys from which the samples were prepared, Coast Metals No. 50 and No. 52, each within the claims of Patent No. 2,743,177, are used for fluxless brazing and that there are many uses of brazing alloys where

flux cannot be used [R. T. 635]. From the condition of the samples in evidence, Mr. Foerster stated that the presence of aluminum would be very detrimental where the brazing is done in furnaces without flux [R. T. 634-635].

Mr. Cape testified on cross-examination that in welding of an alloy made with an aluminum content of 0.1%, the alloy will boil and will flow very sluggishly, and that the joint will be a poor one [R. T. 66]. He stated that, while the alloy will adhere, it will not flow consistently over the surface of the base metal [R. T. 66].

In the tests as to which Mr. Miller, Wall Colmonoy's expert, testified, flux was applied and the samples were prepared in a furnace in a hydrogen atmosphere [R. T. 563]. He admitted that he did not know from direct experience whether or not an alloy containing aluminum would boil when it was applied to a surface by means of an oxy-acetylene torch [R. T. 566] and that his testimony as to lack of a detrimental effect of aluminum was only as to coating of samples by furnace fusing [R. T. 566-567]. Mr. Miller further admitted that the presence of aluminum in a brazing alloy would require for a particular base metal, such as Inconel X, a different brazing technique than would be required in the case of a brazing alloy that does not contain aluminum [R. T. 565]. He further conceded that the presence of aluminum in an alloy might require some type of remedial measure such as the applying of flux [R. T. 570].

The evidence, therefore, contrary to the assertions of Wall Colmonoy, shows that the presence of aluminum does have a detrimental effect upon the patented al-

loys. Clearly the evidence falls far short of establishing that any misrepresentation whatsoever had been made to the Patent Office.

As to the statements regarding the effect of titanium, Mr. Cape testified that the presence of titanium would be deleterious depending upon the use of the alloy [R. T. 87], as in the case of welding and brazing with torches [R. T. 88]. The fact that, since the time of the statement to the Patent Office in an amendment dated September 28, 1953, it has been found that titanium can be used for some specific jobs of brazing [R. T. 88] does not make the statement to the Patent Office untrue at the time it was made. The admission to which Wall Colmonoy refers in its brief is entirely consistent with the foregoing, for it states that a Coast Metals alloy containing titanium has special uses in conjunction with a stainless steel base metal [Ex. B at C. R. 152].

In *Martin v. Ford Alexander Corporation*, 160 Fed. Supp. 670, 685 (D. C. S. D. Cal. 1958), in denying the defense that certain statements in affidavits constituted a fraud practiced on the Patent Office, the Court said:

“. . . In a matter of this character, as in all matters relating to fraud, there must be *scienter*, *i.e.*, knowledge on the part of the person that what he is stating is false.

imply willfulness. Here we do not have even a showing of that type of irresponsible utterance which is, at times, identified with willfulness.”

“The frauds which call for denial of enforceability in patent law must be of the type which

In the second instance, the file wrapper of Patent No. 2,743,177 shows that the statements in the prosecution which Wall Colmonoy attacks were not “essentially material” to the issuance of the patent. In other words, entirely apart from the statements attacked by Wall Colmonoy, other grounds were presented which required that the Patent Office withdraw British Patent No. 580,686 as a basis for rejection.

In the amendment filed July 26, 1955 [Ex. E at C. R. 198-201], following which a notice of allowance issued, it was pointed out by Coast Metals’ attorney that the British Patent [Ex. F at C. R. 207] was not a proper basis for rejection of the claims in the application because [C. R. 199] “an indeterminable amount of experimentation would be necessary if applicant’s alloy was to be arrived at, and there is no assurance that even after such experimentation, the applicant would recognize the benefits derived by the present alloy.” This was an eminently correct statement of the effect to be given to a foreign patent. *Carson v. American Smelting & Refining Co.*, 4 F. 2d 463, 465 (9th Cir. 1925). The British patent made reference to boron only as one of twelve elements of a group. It was with regard to testimony as to this patent on this very point that the District Court, in overruling an objection by Wall Colmonoy’s counsel on cross-examination of defendant’s expert, said [R. T. 562]:

“The Court: I think the inquiry is correct. If one takes one of ten elements that a man says if combined with others will give you something, and says this is within the teaching of the patent, that is absurd. If a patent teaches nine ways of doing

a thing, and then somebody else selects one of those, there is no infringement, there is no anticipation.”

Since the amendment of July 26, 1955 set forth the foregoing as well as other grounds as to why the British patent did not constitute a proper basis for rejection of applicant's claims, Wall Colmonoy cannot validly assert that the patent issued because of the statements as to titanium and aluminum.

As stated in *Baldwin-Lima-Hamilton Corporation v. Tatnall Measuring Systems Company*, 169 Fed. Supp. 1, 24 (D. C. E. D. Pa. 1958):

“Furthermore, even if the statements in the November 19, 1941 amendment which have been dealt with meant to Simmons and the Patent Office what defendants say they must have meant, defendants still must prove that the statements were material in the sense that but for them the patent would not have issued. A false statement which has been recklessly made will not serve to destroy the presumption of the validity of a patent unless the statement was ‘essentially material’ to its issuance. *Corona Cord Tire Company v. Dovon Chemical Corp.*, 1928, 276 U. S. 358, 373-374, 48 S. Ct. 380, 72 L. Ed. 610. . . .”

The evidence in the record does not support Wall Colmonoy's assertion that false statements were made to the Patent Office during the prosecution of the application on which Patent No. 2,743,177 issued. Further, the law applicable to the facts here presented does not deny to that patent its presumption of validity.

**There Is No Basis for Wall Colmonoy's Assertion
That Claims 1, 3, and 4 of Patent No. 2,743,177
Are Indefinite.**

While Wall Colmonoy asserts in its brief that claims 1, 3, and 4 are indefinite and therefore invalid, it fails completely to show in what respect the claims do not particularly point out and distinctly claim the alloys of Cape's invention. Each of the three claims in issue specifically claims the alloying constituents, nickel, silicon, and boron. Each of the claims specifies defined proportions for silicon and boron and concludes "the balance of the alloy being essentially nickel." These claims fully meet the requirements of 35 U. S. C. A., Section 112.

Finding 5 [C. R. 47] simply states that the claims cover a large number of specific nickel-base hard-facing alloys in which the proportions of each of the ingredients or constituents can be varied within the compositional ranges set forth therein. Obviously, whenever a compositional range is claimed, a number of products may be produced within the range. As said in *Application of Cavallito*, 282 F. 2d 357, 361 (C. C. P. A. 1960):

"The mere fact that a claim covers a large, or even an unlimited number of products, does not necessarily establish that it is too broad. Claims are commonly allowed for alloys or mixtures which permit substantial variations in the proportions of two or more ingredients. Theoretically an indefinite number of products may be produced falling within the scope of such a claim. In the case of alloys or mixtures, however, it is generally apparent how a product of any desired proportions

may be produced, and, since the properties of the aggregate ordinarily vary in accordance with the proportions of the ingredients, the characteristics of any aggregate covered by the claim can generally be predicted with reasonable certainty if the properties of typical aggregates are known. In such cases an applicant, by fixing the ranges of proportions and describing a few examples throughout the range, may enable anyone skilled in the art to make any product covered by the claim, and may inform him as to what properties such a product will have.”

Cape specifically set forth in his patent a number of examples of the proportions of silicon and boron which together with nickel produced the substantially enhanced combination of properties found in the alloys of his invention [Ex. 1 at C. R. 72, col. 2, lines 38-54]. The claims and specification of Patent No. 2,743,177 fully meet the requirements laid down by the courts as to definiteness. In *Georgia-Pacific Corp. v. United States Plywood Corp.*, 258 F. 2d 124, 136 (2nd Cir. 1958), the Court said:

“ . . . If the claims, read in the light of the specifications, reasonably apprise those skilled in the art both of the utilization and scope of the invention, and if the language is as precise as the subject matter permits, the courts can demand no more. . . .”

See *S. D. Warren Co. v. Nashua Gummed & Coated Paper Co.*, 205 F. 2d 602, 606 (1st Cir. 1953).

Wall Colmonoy refers to no evidence that suggests that the claims and specification of Patent No. 2,743,-

177 do not demark the invention so as to inform someone skilled in the art of the nature of the invention. It adverts only, at page 26 of its brief, to some testimony of Mr. Cape with respect to the limits of the constituents set forth in the single claim of the '183 patent, the other patent in the suit. What bearing this has on claims 1, 3, and 4 of Patent No. 2,743,177 is in no way indicated.

No issue of boundary areas to determine infringement is presented here. The infringing alloy, Nicrobraz 130, is squarely within claims 1, 3, and 4 of the patent. This Court in *Research Products Co. v. Tretolite Co.*, 106 F. 2d 530 (9th Cir. 1939), stated at page 534:

“ . . . If it is indefinite in some respects due to the comprehensive character of the invention and of the claims therefor, it is not uncertain in the area of description involved in this action. Any vagueness in these outlying boundaries of the description does not invalidate the patent as to that which is clearly defined. . . . ”

Claims 1, 3, and 4 meet the requirements of particularity of 35 U. S. C. A., Section 112, and the standards of definiteness approved by the courts.

Conclusion.

In its briefs, Coast Metals has shown that the District Court erroneously concluded that claims 1, 3, and 4 of Cape Patent No. 2,743,177 were invalid. It has demonstrated that there is not any substantial evidence showing that the discovery of the claimed alloys did not constitute invention. To the contrary, the evidence in the record showed the lack of obviousness of the

patented alloys to those skilled in the art at the time of the invention. The judgment below as to invalidity of claims 1, 3, and 4 of Cape Patent No. 2,743,177 should be reversed.

The alloy, Nicrobraz 130, sold by Wall Colmonoy should be found to infringe claims 1, 3, and 4 of Patent No. 2,743,177 as a matter of law.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ANDREW J. BELANSKY.

